United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT GERALD A. BIGSBY

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

160

No. 24,498

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD A. BIGSBY,

Appellant.

Nos. 24,499
and 24,796

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL R. ADAMS,

Appellant.

No. 24,797

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL WEAVER,

Appellant

Appeal from the United States District Court
For the District of Columbia

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A. Bigsby, Appointed by
this Court

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QUESTION PRESENTED

Did the trial court err in failing to grant Appellant Bigsby's motion to suppress the identification testimony?

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BRIEF FOR APPELLANT, GERALD A. BIGSBY

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, Section 1291, of the United States Code. It is an appeal of the conviction of the appellant, Gerald A. Bigsby, of robbery and violation of Title 22, Section 2901, D.C. Code.

This case is being heard on appeal in conjunction with appeals filed on behalf of two other parties convicted along with this appellant, namely, Michael R. Adams and Michael Weaver. These cases have not been before the Court before.

Statement of the Case

This case involves a robbery which occurred in Georgetown during the early morning hours of October 10, 1969. The victim, a Mr. Henhoeffer, testified that he was robbed by three young Negro males as he was returning to his car. He had been to a local tavern, and he estimated the time of the offense to be around 1:30 a.m. (Transcript p. 48).

On his way to his automobile, Mr. Henhoeffer had been accosted by three young Negro males, who he had noticed shortly after his departure from the tavern.

One of the three positioned himself in front of Henhoeffer, placed what he took to be a .45 caliber pistol against his chest and announced "This is a hold-up." The other two were behind him and one of them was going through his pockets, aided by the gunman (Transcript p. 50).

After approximately thirty seconds to one minute, a police car appeared prompting the assailants to run and Mr. Henhoeffer to summon the police to his aid. (Transcript pp. 53,69)

Upon the arrival of the police car, Mr. Henhoeffer attempted to identify the assailants. His identification consisted primarily of indications that they were three young Negro males, age eighteen

to twenty, with the one holding the gun supposedly wearing a white jacket and a black cap, one wearing a blue jacket and one being significantly taller than the others (Transcript p.53, et seq.).

Mr. Henhoeffer entered the police car and they gave pursuit. Two young Negro males were observed running and one of these two, who was subsequently identified as Michael Adams, was apprehended in the presence of Henhoeffer (Transcript p. 55). A second young Negro male was taken into custody by Officer Roche. Officer Roche had been one of the police officers in the police car and the individual whom he arrested was a young Negro male wearing a blue jacket and was one of the two that had been observed running down the street.(This individual was later identified as Michael Weaver (Transcript pp. 76 - 80).

Other than Adams and Weaver, Officer Roche had not observed any other individuals running (Transcript pp. 84-85).

The officers had not observed the robbery (Transcript pp. 88, 108).

After Adams and Weaver had been taken into custody, Officer Anastasi, who had been the second police officer in the patrol car, made the arrest of another young Negro male, subsequently identified as Gerald A. Bigsby. This arrest took place on private property, in a backyard, in the vicinity of the other arrests and where the robbery took place (Transcript pp. 99 - 106). Bigsby was supposedly wearing at that time a white jacket, dark pants and a dark hat (Transcript p. 104). There was also found a small gun underneath a brown jacket near Bigsby in the yard (Transcript p. 105).

Later that evening at the Seventh Precinct, and approximately two hours after the incident, Mr. Bigsby, while in custody, was observed by Mr. Henhoeffer. The observation was in the front of the stationhouse, where it was apparently well lit, and at a time when Mr. Bigsby was not wearing any hat or cap (Transcript pp. 25, 26-65,66). On October 14th at a police lineup, the complainant, Mr. Henhoeffer, identified Mr. Bigsby (Transcript pp. 27, 56-59).

It was admitted by Mr. Henhoeffer that it was possible that his identification at the police lineup was based in part upon his having seen Mr. Bigsby at the stationhouse on the night of the event when he was in custody (Transcript pp. 29, 32, 66).

There was a motion, timely made, by counsel for Mr. Bigsby to suppress the identification, which motion was denied (Transcript pp. 17,18, 19-32).

Argument

The Court Erred in Denying the Motion to Suppress the Identification.

The Court has had before it, in a variety of postures, the question of a confrontation between the accused and tne accuser, at various stages of the proceedings, and the rights to which the accused is entitled at these various stages. Most of the questions have addressed themselves to the presence of counsel for the accused at such confrontations. The arguments in this area most frequently trace themselves back to the case of United States v. Wade, 388 U.S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926 (decided June 12, 1967). While the position taken by the appellant in this case does not fall

directly within the prohibitions enumerated in the Wade case, it is the touchstone of his assertion that the court erred in failing to suppress information on identification at the lineup and subsequently in the courtroom when such had been tainted by his earlier exposure to Henhoeffer in a situation that was, at best, incriminating and, at worst, highly suggestive.

As the Court is aware, the Wade decision was rendered along with two other cases addressing themselves to the same problems of confrontation between the accuser and the accused, and subsequent identification in court. The two companion cases were Gilbert v. California, 388 U.S. 263, 18 L.ed. 2d 1178, 87 S. Ct. 1951, and Stovall v. Denno, 388 U.S. 293, 18 L. ed. 2d. 1199, 87 S. Ct. 1967.

There were three Constitutional areas to which the petitioners looked in these companion cases, hereinafter referred to as Wade, Gilbert and Stovall. The petitioners had alternatively sought the aegis of the Fifth Amendment, insofar as it applied to a privilege of self-incrimination, of the Sixth Amendment, insofar as it required a right to the assistance of counsel, and, also, to the Fourteenth Amendment, insofar as it applied to the totality of the facts surrounding the confrontation as it might constitute a denial of due process of law. The appellant in the instant case looks to the Fourteenth Amendment, as opposed to the Fifth and the Sixth, and asserts that the rationale set forth in the above mentioned cases, are perhaps only ancillary, and the decision in those cases should be controlling in the instant case.

It was said in Wade, supra,at 388 U.S. 229:

> But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witneses for pretrial identification. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined." Wall, Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> . . . . .
>
> The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in Stovall v. Denno, 388 US 293, 18 L ed 2d 1199, 87 S Ct 1967, supra. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. (Footnotes and citations contained therein are omitted.)

This admonition is the background against which the facts of this case should be reviewed and decided. While it is again conceded that the major issue in Wade addressed itself to the right of

counsel at lineup, it is significant that the manner in which the identification was made involved a prior confrontation between the accused and the accuser prior to the formal lineup. The situation in Wade was that while the witnesses were waiting to go in to the room to identify anyone that might have been involved, there was an opportunity for Wade to be observed in the custody of an F.B.I. agent.

While this was an observation that took place immediately prior to the lineup, it would have no less of an impact than in the instant case, where Mr. Bigsby was observed in the custody of the police at the stationhouse on the night or early morning in question.

It is contended by the appellant and admitted by the accuser that this observation in the stationhouse played a part in his identification at the lineup (Transcript p. 25). Witness, Mr. Henhoeffer; Questioner, U. S. Attorney:

> Q. While you were at the precinct, did you see any of the three men that robbed you?
>
> A. I think I may have. About two hours after the incident, I would say, after I had given testimony to the arresting officer and also to someone from the robbery squad, I was -- excuse me it was before I gave my testimony to the detective from the robbery squad, I walked out past the front desk and it seems to me that I saw Bigsby there. He was standing at the front desk. . . .
>
> Q. Did you tell anyone at the Precinct that you thought you saw one of the men, if you recall?

A. I don't recall exactly. I think I might have told the detective from the robbery squad. I think I may have told one of the officers also.

Transcript p. 28, Witness: Mr. Henhoeffer:

The Court: On what was the identification based at the lineup?

The Witness: Well, mainly on the fact that the person identified had a fairly - I remember - a fairly broad face. It seemed to me kind of a high forehead.

U. S. Attorney: From when were you remembering these features?

A. I was remembering this from the incident itself, from the robbery itself. I recognized the fact that Imay have seen him subsequently in the station which may have contributed, but to the best of my recollection, my identification was based on my spotting him at the robbery.

Transcript p. 31: (The questioner is the counsel for Bigsby, Mr. Ross, and is referring to the identification made at the lineup.)

Q. And it is your testimony that was based on your recollection of the man at the time of the incident?

A. Yes, sir.

Q. Primarily?

A. Yes, sir.

Q. But not exclusively?

A. I can't say it was exclusively, sir, because I seem to

recollect seeing someone whom I thought was Bigsby subsequently to that about two hours later.

It is also considered significant that Mr. Henhoeffer was relying to a great extent upon his identification of the appellant Bigsby's features; namely, a broad face and a high forehead. The lighting at the robbery was artificial illumination from a street lamp, consumed approximately thirty seconds to one minute, at a time when Mr. Henhoeffer was in admittedly an excitable state, was an observation made of a man who was wearing a cap that was fitted to the head, which did have a visor on it, all of which conditions were not conducive to any identification insofar as features were concerned. The observation made at the stationhouse was made of Mr. Bigsby without a hat on, at a time when the features would have been observable and if the other circumstances were suggestive, then it would be an easy thing for someone to err as to at what time he made his observations concerning the features.

There was also no discussion at the time when Mr. Henhoeffer was attemtping to identify the people to the police officers concerning any features. While it is, of course, conceded that the most immediately noticeable items would have been the clothing, there was no further discussion concerning the means of identification. It is unfortunate at this stage that there was no discussion as to the heights, the weights, the speech and other identifying characteristics that would have allowed us to further explore the power of recall.

While certainly not the basis for appeal, it is significant to note that during the interrogation concerning the identification

prior to the commencement of the trial, Mr. Henhoeffer identified the assailants as follows:

Transcript p. 22:

Q. Did you see, did you give the police any description while you were in the car?

A. I said there were three Negro males, they looked to be about eighteen or so, I said that one was wearing a white jacket, one was wearing a blue jacket, and one had a black cap on.

The significance of that is that this would indicate that these particulars items of clothing were distributed among the three. Later, he appears to be saying that the white jacket and black cap were worn by the gunman.

It is also perhaps of significance -- not to suggest either intoxication or as a sole basis for appeal -- that Mr. Henhoeffer, upon questioning by Mr. Ross in the morning, indicated that he had two drinks, identifying them as Scotch and water. (Transcript p. 30) Later the same day, he identified the two drinks that he had as Scotch and soda. (Transcript p. 49)

He also identified what eventually turned out to be a toy pistol as a .45. All of these items are not to suggest that the credibility of Mr. Henhoeffer was impeached, but merely that his powers of observation and of recall fall prey to the same imperfections of us all and, accordingly, any such identifications that he made should be scrutinized very closely.

At the lineup, as was pointed out above, the complainant had

the precinct confrontation to identify Mr. Bigsby at the lineup.

> Moreover, it is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial. (United States v. Wade, 388 U.S. 230 [footnote omitted.])

In the Stovall case, the confrontation was certainly far more dramatic than here, with the victim being shown the accused in the custody of a lawman and handcuffed. While the Stovall case did not apply Wade and Gilbert, since they did not apply those cases retroactively, it did enunciate the proposition that even absent such protections as enunciated in Wade and Gilbert, there is a valid question as to whether or not the confrontation conducted was so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of law. It enunciated further that this was a recognized ground of attack upon a conviction independent of any right to counsel claim. Stovall, 388 U.S. 302.

A similar problem was faced by the court in Rivers v. U.S., 400 F.2d 935 (1968). In the Rivers case, the confrontation which was between the victim and one of three who had been taken into custody by the police was found to be such a confrontation that would require close scrutiny and pointed out that the Stovall case had expanded the Wade and Gilbert cases to situations beyond any formal lineups. While again, in the Rivers case, there was a discussion as to the absence or presence of counsel as it would have affected the confrontation, it did hold:

> . . . the Trial Judge must satisfy himself that the in-court identification of Appellant by Moore (victim) -- not testimonially related to the occurrence of the confrontation or as a product thereof -- was either harmless error or arrived at independent of the primary illegality and was untainted by it. (Rivers v. U.S., 400 F.2d at 941.)

It is contended here that the earlier allowed confrontation certainly tainted the later identification and, therefore, should have been suppressed. It is again repeated that it matters not whether this confrontation that came about was intentional or unintentional, because the effect would have been the same and, of course, both at the trial stage and at this level, there is no way to determine whether such meeting was fortuitous or by design. It is contended further that the confrontation to be found harmless would have to have been found harmless beyond a reasonable doubt and if that were not so, then the motion should have been granted and, accordingly the conviction should be reversed. Mason v. United States, 414 F.2d 1181, ¶ 2.

While it is certainly not urged upon the Court that no confrontation between the victim and the accused could ever take place, it is suggested that when the confrontation comes about at a time some two hours after the incident, in a different lighting arrangement, in a situation which certainly is indicative that the police are of the opinion that the suspect is the party who committed the crime, then the identification should not be permitted to be presented to a jury.

> Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive. Whatever the police actually say to the viewer, it must be apparent to him that they

> have caught the villain. Doubtless a man see in handcuffs or through the grill of a police wagon looks more like a crook than the same man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicions. And the viewer may have been emotionally unsettled by the experience of the fresh offense. Russell v. U.S., 408 F.2d 1284, ¶ 4.

This particular case went on to explore whether or not the confrontation involved was such that it was a denial of due process, but also, once again, emphasized the fact that an exhaustive inquiry should have been made into the opportunity for any accurate observation. It was found that such an inquiry had been made, but that certainly does not apply in the instant case. The accuracy of the identification certainly is crucial in this case and it is difficult to see in these facts how the identification can survive the admonitions set forth in Wade and the requirements that there should be an independent source for some identification made after an unnecessarily suggestive confrontation. Clemmons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230.

Conclusion

It is respectfully urged that the trial court erred in failing to grant the motion to suppress the identification and, accordingly, the conviction should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing brief was mailed, postage prepaid, this 9th day of April 1971 to John A. Terry, Esq., Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, and to Thomas P. Brown, III, Esq., 1008 20th Street, N. W., Washington, D. C. 20036, and to Harvey B. Bolton, Jr., Esq., 1001 Connecticut Avenue, N. W., Washington, D. C. 20036, court appointed counsel for Appellants Adams and Weaver.

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the indictment was subject to challenge on the ground that alleged hearsay was presented to the grand jury?

II. Whether, assuming the alleged accidental confrontation took place, the trial court's ruling on independent source was proper?

III. Whether the evidence was sufficient to permit the jury to conclude beyond a reasonable doubt that appellants Adams and Weaver were guilty of robbery?

* This case has not previously been before this Court.

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No. 24,498

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Appeals from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were charged with robbery (22 D.C. Code § 2901) in a one-count indictment filed on January 16,

1970. They were tried before a jury, the Honorable Oliver Gasch presiding, on May 5 and 6, 1970, and were found guilty as charged. On June 30, 1970, appellant Bigsby was sentenced to two to eight years in prison. On August 4, 1970, appellant Weaver was sentenced under 18 U.S. Code § 5010 (c) for a period not to exceed ten years. On October 9, 1970, appellant Adams was sentenced also under 18 U.S. Code § 5010 (c) for a term not to exceed ten years. Their appeals from these convictions were consolidated by this Court on December 30, 1970.[1]

The Government's Case

On Friday, October 10, 1969, at about 12:30 a.m., William M. Henhoeffer, a resident of Virginia, entered the Lehi Bar at the corner of Wisconsin and Dumbarton Avenues, N.W., in Georgetown (Tr. 20, 51). Sitting alone, he sipped two Scotches and water before leaving the bar around 1:30 a.m. Crossing Wisconsin Avenue, he walked west on O Street towards his car, which was parked on 35th Street. The night was clear, but the street was dark and deserted (Tr. 61). Walking alone, he reached the corner at 33rd Street, where he noticed three young Negro males on the opposite corner waiting under a street light. "One . . . was noticeably taller than the other two" (Tr. 49). He continued walking across the intersection, still heading west towards his auto. Suddenly he heard footsteps behind him, and on his left a man loomed before him. Standing close to Henhoeffer, the man jabbed "a 45 gun into [his] chest" and exclaimed, "This is a holdup, get your hands up." (Tr. 49.) Simultaneously Henhoeffer sensed two other persons behind him who started to rifle his pockets, removing his wallet containing $27.00, his Papermate pen and his Ace comb (Tr. 50, 73). With his arms raised and unable to

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[1] Appeal No. 24,499 is an appeal from Adams' original commitment pursuant to 18 U.S.C. § 5010 (e). *Cf. United States* v. *Fort*, 133 U.S. App. D.C. 155, 409 F.2d 441 (1969).

see behind him, Mr. Henhoeffer stood for "a minute or possibly somewhat more" within two feet of the gunman later identified as appellant Bigsby, and "got a good look" at him. A street light nearby illuminated the robber's features (Tr. 24-25). He wore a dark cloth "golfer's cap" with "a very small peak" and a white jacket (Tr. 62). Shorter than Henhoeffer, the desperado appeared about twenty years old. He was cleanshaven with a "rather broad face," and "he looked a little nervous as if his lips were dry" (Tr. 64). Staring at the size of the gun, Henhoeffer questioned whether it was real until a voice from behind him urged, "Let's put it to him." At that announcement the victim became nervous; his "estimate shifted the other way," and he became convinced the gun was real (Tr. 50).

Just as the brigands finished frisking Henhoeffer's pockets, the complainant spotted a white car with a "light on it" driving down O Street towards them. As the car drew near, he recognized it as a police scout car. At this point the three men took off running and headed south on 33rd Street, but not before Henhoeffer turned and caught sight of them as they fled (Tr. 69).

Officers Jerome D. Roche and Rosario Anastasi of the Seventh Precinct, Metropolitan Police, were driving east on O Street near 33rd Street when they came upon Mr. Henhoeffer on the sidewalk, waving his arms and screaming "Police." Officer Roche, the driver, pulled the vehicle to the curb and opened the side door. After Henhoeffer related that he had just been robbed, Roche asked for a description. Henhoeffer responded:

> They were three Negro males . . . young about 18 or 20 . . . one was wearing a white jacket with . . . a black cap, one was wearing a blue jacket . . . one had a gun . . . there is one tall, very tall. (Tr. 53-54.)

After climbing into the auto, Henhoeffer directed officer Roche to the three robbers fleeing south on 33rd Street, causing Roche to drive south on the one-way northbound

street. In less than a minute, one block away at the corner of 33rd and N Streets, the police car stopped, and the occupants spotted two Negro males, later identified as appellants Adams and Weaver, running at full pace side by side down N Street towards Wisconsin Avenue. As the two passed under a street light, Officer Roche observed one of them wearing a blue jacket (Tr. 77). Immediately the police car raced down N Street in pursuit. As the police car came upon the two suspects, appellant Weaver, the smaller man wearing the blue jacket, spotted the police car and ran into a field, then turned around and darted back towards 33rd Street. As the police car came to a halt, Officer Anastasi gave chase to the elusive Weaver. Officer Roche, upon exiting from the car, cornered appellant Adams, the taller suspect who wore black horn-rimmed glasses, in the same field; but Adams ran to the street, causing Officer Roche to draw his gun and order him to halt. Seeing the gun, appellant Adams stopped next to an automobile and made "a circle motion [with his arm] towards [Officer Roche] and either threw something or dropped something under [the car]" (Tr. 81). After the suspect was searched, handcuffed and placed under arrest, Officer Roche found on the hood of that same automobile, near which appellant Adams had appeared to drop something, a wallet containing $27.00 and bearing the identification of William M. Henhoeffer. He also discovered, in a gutter within thirty feet of the same automobile, a black Ace comb and a Papermate pen (Tr. 72-73, 82). These articles were later identified as belonging to the complainant (Tr. 72).

Meanwhile Officer Anastasi pursued appellant Weaver for two blocks, never losing sight of him, to a parking lot where he was apprehended, arrested and searched for weapons (Tr. 97). After turning Weaver over to another policeman in a patrol wagon, Officer Anastasi was confronted by an unidentified man, wearing a full-length brown beard and dark hair, who stated that there was someone in the backyard of 1243 Potomac Street, N.W. (Tr. 103). Inside the yard the officer observed appellant

Bigsby slumped over a chair, wearing a white jacket, dark pants and a dark hat. After Bigsby's arrest Officer Anastasi, in searching the yard, uncovered a toy pistol beneath a brown jacket, lying close to the chair where appellant Bigsby had been apprehended (Tr. 101).

Within fifteen minutes after the arrests were completed, Mr. Henhoeffer was transported to the Seventh Precinct, where he was taken to a back room so that his statement might be received (Tr. 24). Two hours later, after leaving the room voluntarily, he walked alone past the front desk of the stationhouse. There he noticed an individual standing at the front desk whose profile resembled that of appellant Bigsby, although Henhoeffer "couldn't be sure of that because there was no police officer standing right there with him" (Tr. 31).

On Thursday evening, October 14, four days after the robbery, William Henhoeffer identified appellant Bigsby from a lineup as the gunman and made a tentative identification of appellant Adams, remarking that Adams did not have his glasses on during the lineup as he did on the night of the robbery (Tr. 31, 58).

The Defense Case

Each appellant offered an alibi defense and denied the commission of the robbery. Appellant Bigsby admitted that he was a narcotics addict who, ten minutes prior to his arrest, "snorted" four capsules of narcotics and became ill (Tr. 132, 135, 137). Upon seeing the police chase three unidentified youths, he hid in the backyard of 1243 Potomac Street, fearing that he would be mistakenly arrested. While in the yard, he discarded his brown shirt, which had six other narcotic capsules in the pocket, in fear of being captured with narcotics in his possession. However, he denied using his brown shirt to conceal the toy pistol, stating that he "threw [the shirt] over in the bushes . . . [and] didn't see no gun or nothing" (Tr. 138). Bigsby admitted knowing appellant Weaver and having seen appellant Adams "around" (Tr. 132).

Appellant Adams testified that he was walking the streets of Georgetown after drinking with five friends whose names he could not remember (Tr. 146, 148). While he was walking on N Street, N.W., a man ran by him, and upon noticing the flash of a dome light from a police car he started to run also (Tr. 146). He admitted having seen appellant Bigsby in "Northwest, Southeast and Maryland sometimes" and said that he had had "associations" with appellant Weaver (Tr. 154).

Appellant Weaver took the stand and explained that prior to his arrest he was driven to Georgetown by a "fairy . . . or homosexual" named Ronald Garvey, who had picked him up on Fourteenth Street, N.W., and asked him whether he would like to go to a party (Tr. 159-160). Upon their arrival at the corner of Wisconsin Avenue and Prospect Street, Garvey made "advances" to Weaver (Tr. 160). Reacting, Weaver then "assaulted him pretty badly, cut his eye" and left the car, but not before Garvey threatened to call the police (Tr. 160). After walking around Georgetown for some time, appellant observed a police car approach him. Thinking they were after him for his assault on the "fairy," he fled but was captured by Officer Anastasi (Tr. 164). Appellant acknowledged knowing appellant Bigsby prior to his arrest (Tr. 165).

ARGUMENT

I. The indictment, valid on its face, was not subject to challenge on the ground that there was hearsay evidence before the grand jury.

Appellant Weaver urges that the indictment against him should have been dismissed because the grand jury indicted solely on the hearsay testimony of Officer Anastasi. This argument is untenable, for it is unquestionably the law that a grand jury indictment can rest on hearsay evidence.

It is settled that, absent procedural irregularities,[2] an

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[2] *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969).

indictment, valid on its face, returned by a legally constituted, nonbiased grand jury, is not subject to challenge.[3]

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits of defendant could always insist on a kind of preliminary trial to determine the competency or inadequacy of the evidence before the grand jury.[4]

Contrary to appellant Weaver's assertion, hearsay evidence standing alone is sufficient to indict. In *Costello* v. *United States*, *supra* note 2, the Supreme Court specifically held that a defendant can be required to stand trial and that his conviction will be sustained where the only evidence presented to the indicting grand jury was hearsay evidence.[5]

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[3] *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956); *Holt* v. *United States*, 218 U.S. 245 (1910); *United States* v. *Davis*, D.C. Cir. No. 23,433, decided December 11, 1970 (unpublished opinion).

[4] *Costello* v. *United States*, *supra* note 3, 350 U.S. at 363.

[5] In *Holt* v. *United States*, *supra* note 3, Justice Holmes, speaking for the Court, stated:

> All that the affidavit [based on hearsay evidence] disclosed was that evidence in its nature incompetent by circumstance, had been considered along with the rest. 218 U.S. at 248.

See United States v. *Blue*, 348 U.S. 251 (1965) (illegally seized evidence presented to the grand jury; indictment upheld); *Laughlin* v. *United States*, 128 U.S. App. D.C. 27, 385 F.2d 287 (1967), *cert. denied*, 390 U.S. 1003 (1968); *Coppedge* v. *United States*, 114 U.S. App. D.C. 79, 311 F.2d 128 (1962), *cert. denied*, 373 U.S. 946 (1963).

In any event, notwithstanding Henhoeffer's alleged hearsay declarations to Officers Roche and Anastasi, the rest of the policeman's testimony before the grand jury was based on firsthand knowledge. He stated that his observation of the fleeing robbers within seconds of the holdup and a half block away from the scene corroborated Henhoeffer's description as to clothing, race, age and the direction of flight. He recounted his chase and subsequent arrest of appellant

II. The trial judge's ruling on independent source is strongly supported by the record even if the alleged accidental confrontation took place.

(Tr. 24, 26, 31, 34, 62, 65)

Appellant urges this Court to speculate that a stationhouse observation by Mr. Henhoeffer of an unidentified person, thought possibly to be appellant Bigsby, was so highly suggestive as to taint irrevocably Henhoeffer's subsequent lineup identification. Appellant's contention is meritless for two reasons: it is indeed questionable whether this unidentified man was appellant Bigsby; and assuming it was Bigsby, the confrontation was accidental without any hint of suggestivity. In addition, appellant's argument is more illusory than real in light of the trial judge's ruling on independent source, that is, that Henhoeffer's "identification . . . is based primarily on what he observed at the time of the robbery as distinguished from what he *may have* observed at the police station." (Tr. 34) (Emphasis added.)

The supposed observation of appellant Bigsby by Mr. Henhoeffer allegedly occurred at the Seventh Precinct two hours after the robbery, when Mr. Henhoeffer of his own accord walked past the front desk of the stationhouse and noticed, but "did not look very closely" at, an unidentified man whose profile revealed a broad face and forehead similar to the features of appellant Bigsby. Henhoeffer was "not sure it was Bigsby" (Tr. 26, 65). The glimpse lasted "only a couple of seconds" (Tr. 26). The man did not wear a hat, as appellant did at the time of the robbery, and he stood alone without any police officers near him (Tr. 31, 65). Henhoeffer was uncertain whether or not he even reported this viewing to the police (Tr.

Weaver. In addition, Officer Anastasi was able to testify a wallet was found in close proximity to where appellant Weaver's companion in flight was captured. This wallet bore the identification of the robbery victim. (Grand Jury Transcript 4-6.) The competency of this evidence alone is sufficient to sustain the indictment. *Coppedge* v. *United States, supra,* 114 U.S. App. D.C. at 83, 311 F.2d at 132.

26). The tenuity of appellant's belief that this unidentified man was appellant Bigsby is evident.

Assuming *arguendo* that there is a basis for believing this unidentified man was appellant Bigsby, Mr. Henhoeffer's encounter with him was accidental[6] and non-suggestive. The confrontation can be a basis for reversal only if it "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant Bigsby] was denied due process of law."[7] There is no suggestion in the instant case of any police instigation or manipulation (Tr. 26). The man whom Henhoeffer saw stood at the counter indistinguishable from the average citizen who might enter a police station. He wore no cap, as the robber did hours before. The non-suggestivity of the confrontation is emphasized by Mr. Henhoeffer's response to this question from appellant's counsel:

> Q: When you thought you saw the man you identified as Bigsby in the stationhouse, was it your impression he was in custody, that he looked like someone that was placed in custody?
>
> A: I couldn't be sure of that, because there was no police officer standing right there with him. There were, of course, police officers behind the desk. This was the front desk as you come in the door. (Tr. 31.)

We think that this answer constitutes affirmative proof that there was not a scintilla of suggestivity in the alleged confrontation.

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[6] *United States* v. *Green*, —— U.S. App. D.C. ——, 436 F.2d 290 (1970); *Gregory* v. *United States*, 133 U.S. App. D.C. 317, 410 F.2d 1016, *cert. denied*, 396 U.S. 865 (1969); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 40, 408 F.2d 1230, 1243 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969); *see Womack* v. *United States*, D.C. Cir. No. 21,235, decided April 22, 1971, where this Court without opinion affirmed a conviction based in part on an accidental stationhouse confrontation similar to that in the instant case.

[7] *Russell* v. *United States*, 133 U.S. App. D.C. 77, 81, 408 F.2d 1280, 1284, *cert. denied*, 395 U.S. 928 (1969), quoting from *Simmons* v. *United States*, 390 U.S. 377, 384 (1968).

The trial court's ruling that Henhoeffer had an independent source for making his in-court identification of appellant Bigsby is strongly supported by the record. Street lights, brought enough to "read a newspaper," illuminated appellant's features (Tr. 62).[8] During the "minute or possibly somewhat more" of the robbery, Henhoeffer was forced to look straight ahead, affording him a "good look at [Bigsby]" (Tr. 24).[9] Appellant was close to him within "one or two feet" (Tr. 24). Henhoeffer was able to furnish a detailed description of his assailant seconds after the holdup. The sureness of Henhoeffer's identification is reflected in his statement, "I did not have any doubt at [the time of the lineup]. I do not now [at trial]." (Tr. 31.) The record, we submit, supports the court's finding of independent source.

III. The evidence was sufficient for a reasonable man to conclude beyond a reasonable doubt that appellants Adams and Weaver were guilty of robbery.

(Tr. 49, 53, 55, 57-58, 69, 95-96)

Appellants Adams and Weaver stress that insufficient evidence existed for the jury to find guilt beyond a reasonable doubt. Relying on *Bailey* v. *United States*, 135 U.S. App. D.C. 95, 416 F.2d 1110 (1969), both appellants erroneously contend that flight is the only evidence against them. In so contending they either misread the record or overlook the evidence presented at trial.

The case against appellant Adams was fourfold: his height, his flight, his actions in discarding the complain-

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[8] *See United States* v. *Kemper*, 140 U.S. App. D.C. 47, 50, 433 F.2d 1153, 1156 (1970); *United States* v. *Terry*, 137 U.S. App. D.C. 267, 272, 422 F.2d 704, 709 (1970); *Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 105, 420 F.2d 1306, 1308 (1969).

[9] *See United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 19, 1971, slip op. at 7; *United States* v. *Kemper*, *supra* note 8, 140 U.S. App. D.C. at 50, 433 F.2d at 1156; *United States* v. *Terry*, *supra* note 8, 137 U.S. App. D.C. at 272, 422 F.2d at 709.

ant's wallet at the time of his arrest,[10] and the tentative lineup identification. On five occasions appellant Adams' height proved inculpatory. When Henhoeffer first observed, prior to the robbery, three Negro males at the corner of 33rd and O Streets, "[o]ne . . . was noticeably taller than the other two" (Tr. 49). Immediately after the robbery, as the trio started to flee from the approaching police car, Henhoeffer "turned around and saw the three men were running south on 33rd Street" (Tr. 69). At that point Henhoeffer again noticed that "one was considerably taller" than the others (Tr. 57). When the police car stopped at the corner of 33rd and N Streets, seconds later and half a block away, Henhoeffer stated that one of the two men fleeing down N Street was a tall man (Tr. 57). Henhoeffer was present at the time of appellant Adams' capture, and he stated that Adams "was the tall one wearing a black rimmed glasses [*sic*]" (Tr. 55). Henhoeffer later identified appellant Adams at the lineup as looking like the tall man "from the night of the incident . . . without his glasses on" (Tr. 58).

The evidence against appellant Weaver is twofold: the color of his jacket and his side-by-side flight with the man who carried and eventually discarded the robbery victim's wallet. Immediately after the robbery, when Henhoeffer caught sight of the two fleeing robbers behind him, he noticed that "one was wearing a blue jacket" (Tr. 53, 57). He gave that description to Officers Roche and Anastasi (Tr. 53). Seconds later appellant Weaver was spotted half a block away wearing a blue jacket, running at full pace side by side with appellant Adams, who possessed the complainant's wallet (Tr. 95-96). When the police car came upon the fleeing duo, Weaver made a diligent effort to escape until finally caught by Officer Anastasi a block and a half away. Clearly the record is filled

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[10] Immediately prior to his actual arrest, appellant Adams "threw something" near an automobile (Tr. 81). Upon checking that location, Officer Roche found Mr. Henhoeffer's wallet. Within thirty feet from the spot of Adams' arrest, the complainant's comb and pen were discovered (Tr. 81-82).

with affirmative proof that appellant Weaver was an active participant in the robbery and that flight alone was not the basis of the government's proof.[11]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States Attorney.

JOHN A. TERRY,
DONALD T. BUCKLIN,
JOHN E. DRURY, III,
Assistant United States Attorneys.

[11] Appellant Weaver's claim of prejudice arising from the denial of his motion for severance is meritless. The mere fact that all the evidence is not admissible against all defendants does not necessitate separate trials. *Opper* v. *United States*, 348 U.S. 84 (1954); *Katz* v. *United States*, 321 F.2d 7 (1st Cir. 1963).

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

24,499

24,796

UNITED STATES OF AMERICA,

Appellant,

v.

MICHAEL R. ADAMS, Appellant

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Counsel for Appellant Adams,
Appointed by this Court

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STATUTES

QUESTIONS PRESENTED

Did the District Court err in failing to grant Appellant Adams' Motion for Judgment of Acquittal N. O, V.?

This case has not been in this Court before.

TABLE OF CASES

STATUTES

REFERENCES TO RULINGS

This is an appeal from an Order entered May 22, 1970, by the United States District Court for the District of Columbia denying appellant's Motion for Judgment of Acquittal N. O. V. following his conviction of Robbery, in violation of Section 2901, Title 22, D.C. Code.

Jursidiction of this Court is invoked under Title 28, Section 1291 of the United States Code.

STATEMENT OF THE CASE

This case involves a robbery which occurred in Georgetown during the early morning hours of October 10, 1969. The victim, a Mr. Henhoeffer, testified that he was robbed by three young Negro males as he was returning to his car. He had been to a local tavern, and he estimated the time of the offense to be around 1:30 a.m. (Transcript p. 48).

Prior to the actual commission of the crime and as he walked west on O Street in the Northwest section of the District of Columbia, Mr. Henhoeffer first observed three Negro males, one noticeably taller than the other two, on the northeast corner of 33rd and O Streets. It was his impression that they were young. He continued along O Street, crossing 33rd (his car was parked in the vicinity of 35th and O Streets). The

three men crossed O Street and then 33rd and came up behind him (Transcript p. 49).

Next, one of the three positioned himself in front of Henhoeffer, placed what he took to be a .45 caliber pistol against his chest and announced "this is a hold-up". The other two were behind him and one of them was going through his pockets, aided by the gunman (Transcript p. 50).

The robbery was completed in a half a minute or a minute. At the completion a police patrol car appeared a half a block or so away and while Henhoeffer hailed the police, all of the assailants began to run, heading south on 33rd Street with their backs to their victim (Transcript pp. 53, 69).

The police patrol car picked up Henhoeffer and he told them he had been robbed by three young Negro males, ages 18 to 20. He described one, the gunman, to be wearing a white jacket with a black cap, and another to be wearing a blue jacket (Transcript p. 53). The police vehicle, with Henhoeffer inside, proceeded south on 33rd Street and made a left turn on N Street at which time the victim and the officers spotted two young Negro males running quickly on the sidewalk towards Wisconsin Avenue. One of the two was apprehended in the presence of Henhoeffer; this accused was not wearing a blue jacket nor was he wearing a white jacket with a black cap. He was only

identified as the taller of the two men running on N Street and it was noted he wore black rimmed glasses (Transcript p. 55). He was later identified as Michael Adams.

At the trial the witness was asked if the two men running on N Street generally fit the description of two of three men he had seen leaving the scene of the robbery, and he replied (Transcript p. 57) ". . . I don't know if I can testify to that."

Four days later at a police line up and after the victim had made a positive identification of one of the suspects, Appellant Adams was described as looking like one of the other two (Transcript p. 58), but on cross examination the victim explained he was given the option and did not make a positive identification, and he stated further that by excluding this option he was negating it (Transcript p. 70).

Officer Roche of the Metropolitan Police was the next witness and he stated that as soon as he and Officer Anastasi, his partner, had picked up Henhoeffer and had been given a description of the three robbers, he headed the police cruiser south on 33rd Street, glanced to his left at its intersection with N Street and spotted two Negro males running on the sidewalk, one of whom wore a blue jacket and was later identified as the defendant Weaver (Transcript p. 80). The other man was Adams, and when Officer Roche described his arrest, he

testified that Adams ran up to a parked automobile and while making a circle motion towards him with his left hand, he (Adams) either threw or dropped something. After Adams had been secured, Officer Roche testified, he searched the area and found the complainant's wallet on the hood of the parked car containing complainant's identification and twenty-seven dollars ($27.00) (Transcript p. 81). Twenty-five or thirty feet away the Officer found a comb and a pen belonging to Mr. Henhoeffer. No fingerprints were taken from the wallet (Transcript p. 85).

Appellant Adams took the stand and denied taking part in the robbery. He was walking along N Street when he saw the dome light of a police car flash up against a building and he took flight. As he was running and prior to his arrest, someone passed him, also running (Transcript p. 143), and that person went on. Next, two policemen approached him with guns drawn and Appellant Adams flinched and started to fall down in front of a parked car (Transcript p. 143,144) as the officers arrested him.

Adams testified that he had been in Georgetown with several people, but they had left and he was lost at the time of his apprehension. He denied ever possessing or throwing the victim's wallet (Transcript p. 146, 147), but he said he did flee from the police at first.

At the conclusion of the Government's case, the trial judge denied a Motion for a Judgment of Acquittal as to Appellant Adams. The case was allowed to go to the jury and the Appellant was convicted of the offense of robbery. A Motion for Judgment of Acquittal N. O. V. was also denied by the Court by Order filed May 22, 1970, the Court stating:

> One of them (Adams) was observed seeking to discard the victim's wallet. . . Under these circumstances the Court finds there was adequate evidence to support the jury's verdict of guilty beyond a reasonable doubt. . .

ARGUMENT

There Was Insufficient Evidence To Sustain A Finding Of Guilt Beyond A Reasonable Doubt

It is requested that the Court read the following portions of the Transcript: pp. 19-22; 26-27; 53-55; 57-58; 60; 69-70; 76-82; 85; 142-148. Further, the Court's attention is directed to Adams' Motion for Judgment of Acquittal N. O. V., filed in the District Court May 11, 1970, and the District Court's Order denying the Motion, filed May 22, 1970.

Michael Adams was convicted by the jury of the offense of robbery, yet an analysis of the evidence, even when taken in the most favorable light to the United States, is such as to permit a reasonable doubt as to his guilt. The trial judged erred in not granting the Motion for Judgment of Acquittal N. O. V.

The complaining witness, one Henhoeffer, was robbed by three men. He said all three were young Negro males, but aside from this very general description, he was unable to place Appellant Adams at the scene or identify him as a participant; however, despite the fact the offense was committed in a minute or less, the witness was able to give the police, who arrived on the

scene almost instantly, a description of two of the assailants and later positively identify the gunman in a line up.

Within several minutes of the crime, Adams was arrested as he ran east on N Street in Georgetown. Henhoeffer was a passenger in the scout car and witnessed the arrest. From his observation at that time he could certainly describe Adams, but when asked by the prosecutor if the two men running east on N Street generally fit the description of two of the three men he had seen leaving the scene of the robbery, he replied, ". . . I don't know if I can testify to that. . ." The only other identification by Henhoeffer as to Michael Adams was made four days later at a police line up when he said, ". . . number eight (Adams) looked like one of the other two" (who took part in the robbery). This testimony, even though only a tentative identification, was obviously the product of seeing Adams at the time of his arrest and is totally contrary to the victim's earlier and above quoted statement.

A second circumstance linking Adams to the crime is the fact of his flight along N Street, and its proximity to the place where the crime occurred, just prior to his apprehension. His flight no doubt resulted in pursuit and subsequent arrest by the police officers, but as stated in a recent decision by this Court, Bailey (John L.) v. United States, 135 U.S. App. D.C. 95,

416 F.2d 1110:

> The evidentiary value of flight, however, has depreciated substantially in the face of Supreme Court decisions delineating the dangers inherant in unperceptive reliance upon flight as an indicium of guilt. We no longer hold tenable the notion that "the wicked flee when no man pursueth, but righteous are as bold as a lion." The proposition that "one who flees shortly after a criminal act is committed or when he is accused of committing it does so because he feels some guilt concerning that act" is not absolute a legal doctrine since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. (Citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9L. Ed. 2d 441 (1963); Starr v. United States, 164 U.S. 627, 17 S.Ct. 223, 41 L. Ed. 577 (1897); Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L. Ed. 528 (1896); Alberty v. United States, 162 U.S. 499, 16 S.Ct. 864, 40 L. Ed. 1051 (1896); Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L. Ed. 474 (1896); and Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767).

Like Bailey, Appellant Adams had the misfortune of being in the area of the crime. Under the doctrine of the Bailey case, at p. 1115, "guilt as a factual deduction must be predicated upon a firmer foundation than a combination of unelucidated presence and unelucidated flight." Michael Adams was in Georgetown, he was lost and he became scared when he saw the dome lights of the police cruiser and consequently, he fled.

The other evidence casting suspicion on Adams was the

location of the victim's wallet. It was found on the hood of a car near the place where the Appellant was arrested. The trial judge stated in his Order denying the Motion for Judgment of Acquittal N. O. V., "One of them (Adams) was observed seeking to discard the victim's wallet. . ." and he concluded ". . . there was evidence to support the jury's verdict of guilty beyond a reasonable doubt . . ." The testimony of the arresting officer, it is submitted, did not, as the Court recollected, state he was observed seeking to discard a wallet. Officer Roche testified (Transcript p. 80-81):

> . . . Mr. Adams came out the front of an automobile, and at this time I closed the distance, maybe ten to seven feet. I had my service revolver, and I told him to halt. At this time he seen--concentrated on the revolver, and he didn't quite halt, he ran up to an automobile that was parked there at which time his left hand, he was making a circle motion towards me, and he either threw something or dropped something under there.

In a similar situation was an appellant named Vaughan in the case of Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793, cert. denied, 382 U.S. 920, 86 S.Ct. 298, 15 L. Ed. 234 (1965), in which four occupants of a get-a-way car were arrested an hour after a store had been robbed by three men. A search of the car turned up money taken from the store in a "Sealtest" bag and a gun. The proprietor of the store positively identified three of the four as his assailants. The fourth, Vaughan,

denied participation. The Court concluded that his presence in the back seat of the car with the loot undivided as it was did not sufficiently justify beyond a reasonable doubt that he had been involved. In the case at bar, there is a fairly positive identification of two of the three, but like Vaughan, Adams cannot be placed at the scene and here the Appellant's proximity to the victim's wallet (found on an automobile hood, not "under there"--the expression used by Officer Roche) does not without other corroborating testimony remove reasonable doubt. There were no fingerprints taken from the wallet. Another man, one who fit one of the two identifications given by the victim to the police, ran by Adams as he fled along N Street--could he have discarded the wallet--and there is the denial by Adams of his involvement.

The elements of the Government's case taken as a whole cannot remove reasonable doubts. Henhoeffer is not able to identify Adams as one of the three who fled the robbery, although able to give reasonable identifications as to two others. The fact of his flight is explained by him and is not significant. And finally his arrest near the wallet is not conclusive enough to eliminate reasonable doubt.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the District Court erred in failing to grant Appellant Adams' Motion for Judgment of Acquittal N. O. V.

Respectfully submitted,

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Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was hand delivered to the United States Attorney this _____ day of March, 1971, and mailed postage prepaid to Ben Cotten, Esquire, 1314 19th Street, N.W., Washington, D. C., counsel for Gerald A. Bigsby, and Thomas P. Brown, III, Esquire, 4948 St. Elmo Avenue, Bethesda, Maryland, counsel for Michael Weaver.

Harvey B. Bolton, Jr.

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,797

UNITED STATES of America

Appellee

v.

Michael WEAVER

Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

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Counsel for Appellant
(Appointed by this Court)

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ISSUES PRESENTED FOR REVIEW

1. Whether or not indictment should have been dismissed on the grounds that there was insufficient evidence presented to the Grand Jury to indict. When Motion to Dismiss was denied should Motion to Sever have been granted?

2. Whether or not Motion for Judgement of Acquittal at the close of the governments case should have been granted on the grounds that the government had not met the burden of proof against Michael Weaver.

3. Whether or not Motion for Judgement of Acquittal N. O. V. should have been granted because there was insufficient evidence to sustain a finding of guilt beyond a reasonable doubt.

This case has not previously been before the Court under the same or any other title.

REFERENCES TO RULINGS

1. Denial of Motion to Dismiss Indictment

   Transcript page 11 (Transcript page will hereinafter be referred to as Tr. and this transcript will be the Transcript of proceeding for May 5, 1970 and May 6, 1970. The abbreviations S. Tr. will refer to Supplemental Transcript and page of transcript for proceedings of March 3 and March 17, 1970) and Denial of Motion to Sever (Tr. 11)

2. Failure to grant Motion for Judgement of Acquittal at close of governments case (Tr. 128)

3. Denial of Motion for Judgement of Acquittal N. O. V. following conviction of Michael Weaver for robbery, in violation of Section 2901 Title 22, D. C. Code. Order of Court signed May 21, 1970.

   The Juristiction of this Court is invoked under Title 28 Section 1291 of the United States Code.

STATEMENT OF THE CASE

Mr. William Michael Henhoeffer (hereinafter referred to as Henhoeffer) on October 10, 1969 at approximately 1:30 A.M. (Tr. 48) was in the Georgetown Area of the City of Washington. Having left a bar in the early morning hours (1:30 A.M.) he headed west on O Street, N.W. towards 35th Street where his car was parked. He admits to having two drinks in the bar (Tr. 49). Henhoeffer testified that when he reached 33rd and O Street he noticed standing on the northeast corner of 33rd and O Streets "three Negro males" (Tr. 49). After he crossed 33rd Street Henhoeffer testified he heard footsteps behind him and that a man positioned himself in front of him and told him that "This is a hold up. Get your hands Up." (Tr. 49). Henhoeffer testified that there were two men standing behind him whom he could not see (Tr. 50). He testified that one of the men behind him went through his pockets removing his wallet, pen and a comb (Tr. 50). Regressing, Henhoeffer testified that when he first saw the three men they were across the street from him on the northeast corner of 33rd and O Street (Tr. 5). After he glanced at the three Negro males he continued along 33rd Street. The persons who robbed him came up from his left rear (Tr. 52) and were with him from approximately 30 seconds to a minute (Tr. 52). Then a police patrol car came down O Street heading east (Tr. 53). The three Negro males then ran south on 33rd Street. Henhoeffer described the men as being "...young, about 18 or 20 or so, and I said one was wearing a white jacket with a, I thought was a black cap, one was wearing a blue jacket..." (Tr. 53). He identified the man with the white jacket

and the black cap as the gunman in front of him (Tr. 53). With respect to the man in the blue jacket. Henhoeffer indicated he had not seen him at any time prior to the robbery (Tr. 54). "It must have been after the robbery when I saw his blue jacket. I didn't recognize anything else or remember anyother characteristics." (Tr. 54). The balance of Henhoeffer's testimony deals with a subsequent ride in the police car which went south on 33rd Street then turned east on N Street, and the following of "two young Negro males running east on N Street" (Tr. 54); and the apprehension of one of the Negro males wearing a black cap. Henhoeffer never saw the man with the blue coat again that evening (Tr. 56), nor did he recognize him in the line up (Tr. 56). Appellant Weaver was in the line up. Henhoeffer subsequently picked defendant Bigsby and defendant Adams out of the line up as being involved in the robbery (Tr. 59). During cross examination Henhoeffer testified that the only lighting on the corner was a standard street light (Tr. 52) then later insisted there were two street lights on the corner (Tr. 63). The only further testimony of Henhoeffer with regard to the participation of man in the blue jacket was when he said "It is possible that I noticed that one was wearing a blue jacket." (Tr. 57). He was there referring to the two men running on N Street.

Officer Jerome David Roche (hereinafter referred to as Roche) testified that at approximately 1:30 A. M. on October 10th he was proceeding east on O Street in a police patrol car when he saw a man screaming "police" (Tr. 76); no one was with the man. Roche and his partner, Officer Anastasi, stopped their car. Anastasi got out of the car and interviewed the man who was in fact Henhoeffer. Henhoeffer reported a robbery (Tr. 76). The police car with

Henhoeffer now inside proceeded south on 33rd Street to the intersection of 33rd and N where on reaching the intersection Roche, looking down N Street to the east, saw two Negro males running on the sidewalk. One of them had on a blue jacket (Tr. 77). Roche testified that the man in the blue jacket who was apprehended was named Michael Weaver.

Officer Rosario Anastasi (hereinafter referred to as Anastasi) testified that he was with Roche on the night of the alleged robbery and that at the time he observed witness Henhoeffer, Henhoeffer was by himself (Tr. 94); that after interviewing Henhoeffer and taking him into the car they continued down 33rd Street in the police car until they came to N Street and after looking down N Street "My partner observed two Negro males running east on N Street" (Tr. 94). That was the first time he saw the Negro males (Tr. 95), and they were over a block away (Tr. 112). Anastasi testified that he chased and subsequently apprehended a Negro male with the blue jacket (Tr. 96), whose name was later learned to be Weaver. A while later Anastasi apprehended Appellant Bigsby in the back yard at 1243 Potomac Avenue (Tr. 99). In front of the chair in which Bigsby had been sitting was a brown jacket and underneath the jacket there was a small gun (Tr. 101). The gun later proved to be a toy gun. Appellant Adams was apprehended in another location by Roche. Near where Adams was apprehended the police found Henhoeffer's wallet.

Police Lieutenant Louis Blancato (hereinafter referred to as Blancato) testified that he supervised the line-up which was held and that although Weaver was in the line-up he could not be identified by Henhoeffer. The Court affirmed this fact at Tr. 124.

After the Government rested its case Counsel for Weaver moved for Judgement of Acquittal with regard to the Appellant Weaver. The Court did not rule on the motion but reserved a decision thereon (Tr. 129).

Appellant Weaver testified that on the night in question he was offered a ride to a party by Mr. Ron Garvey (Tr. 159) in Georgetown. When they reached the corner of Wisconsin and N Streets in Georgetown Garvey made improper advances to Weaver, Weaver struck Garvey and jumped out of the car. While running away from Garvey he was spotted by the police, chased and apprehended at the corner of Prospect Street and Potomac Street (Tr. 164). He denied any participation in the robbery (Tr. 166) and also testified that he had neither seen nor met with Bigsby or Adams the night of the alleged robbery (Tr. 165).

Following the close of defendants case Counsel for Appellant Weaver renewed Motion for Judgement of Acquittal and the Court again reserved (Tr. 179).

The Jury brought in a verdict of guilty as to Appellant Weaver. Counsel for Weaver moved for Judgement of Acquittal N. O. V. which was later denied by Order dated May 21, 1970.

ARGUMENT

1. INDICTMENT SHOULD HAVE BEEN DISMISSED ON THE GROUNDS THAT THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO THE GRAND JURY TO INDICT. WHEN THIS MOTION WAS DENIED MOTION TO SEVER CASES SHOULD HAVE BEEN GRANTED.

It is requested that the Court read the following:

a) Motion to Inspect Grand Jury Minutes filed March 12, 1970.

b) Minutes of Grand Jury proceeding pp. 2 thru 8.

c) Supplemental Transcript of testimony of March 3 and 17, 1970, pp. 6 thru 24

d) Transcript of May 5, 1970, pp. 4 thru 11.

The Grand Jury which initially indicted Adams and Bigsby did not indict Appellant Weaver. An Assistant U.S. Attorney dismissed the case as to Weaver initially (S.Tr. 12). Later Weaver was indicted by a Grand Jury which heard only the testimony of the officer who had arrested Weaver (Minutes of Grand Jury proceedings - January 16, 1970). Counsel for Weaver filed a Motion to Inspect the Minutes of the Grand Jury prior to trial (S.Tr. 7). Counsel explained at that time that it would like to move to dismiss the indictment on the grounds of insufficient evidence being presented to the Grand Jury however, such a motion would be impossible unless he would be able to inspect the Grand Jury Minutes prior to trial (S.Tr. 9). The trial Court however instructed the U.S. Attorney to make the Minutes available to Counsel for Weaver the day

before trial (S.Tr. 23), and stated that he would hear counsel's Motion to Dismiss the Indictment on the date set for trial (S.Tr. 18).

After counsel for Appellant gained access to the Grand Jury Minutes he moved orally to dismiss the indictment on the date of trial.

Although the complaining witness had testified before the Grand Jury in connection with the proposed indictment against Bigsby and Adams he had never testified before the Grand Jury in connection with the proposed indictment against Appellant Weaver. When an indictment against Appellant Weaver was proposed the only testifying witness against Weaver was Officer Anastasi (see Minutes of Grand Jury dated January 16, 1970). Officer Anastasi could only give hearsay evidence with regard to the alleged robbery since he did not witness the robbery. Hearsay evidence standing by itself is insufficient to indict.

In the case of U.S. v. Arcuri, D.C. N.Y. 1968, 282 F. Supp. 347, the Court stated as follows at p. 349:

> "The practice - as in the instant case - of relying on hearsay rather than upon the testimony of eye-witnesses is pernicious for two reasons. First it habituates the Grand Jury to rely upon 'evidence' which appears smooth, well integrated and consistant in all respects. Particularly because neither cross -examination nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events. Thus they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where technically a prima facie case may have been made out. It is moreover unlikely to demand additional evidence."

The Court in United States v. Umans (368 F 2d. 725, 730 [2d Cir. 1966] cert. granted 386 U.S. 940, 87 S. Ct. 975, 17 L. Ed. 2d 872, writ of

certiorari dismissed as improvidently granted 389 U.S. 80, 88 S. Ct. 253, 19L Ed. 2d 255 [1967]) stated as follows:

> "Excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

The trial Court in this case agreed that if the Grand Jury heard only hearsay it would vitiate the indictment (S.Tr. 13).

Nevertheless, although only hearsay evidence on the robbery was presented to the Grand Jury, Appellant's Motion to Dismiss the Indictment was denied. This was reversible error.

In addition to the foregoing, it was made apparent to the trial court prior to trial, through admissions of the U.S. Attorney at S.Tr. 14 and S. Tr. 19 that the robbery victim could not identify Weaver as being one of the robbers. Again, prior to trial during the hearing on Appellant's Motion to Dismiss the Indictment it was made apparent that the government was relying on evidence of flight only in its case against Weaver plus the fact that Weaver was wearing a blue coat on October 10, 1969.

Nevertheless, despite the decision of this Court in Bailey (John L.) v. United States 135 U.S. App. D.C. 95 416 F 2d 1110 (This case to be discussed more fully below in parts 2 and 3 of Argument) the trial court erroneously failed to grant the Motion to Dismiss the Indictment against Weaver.

As with the Motion to Dismiss the Indictment, the trial court advised counsel (S. Tr. 23) that he would also hear a Motion to Sever on the day of trial.

In so doing the Trial Court stated as follows:

> "I'll hear you on that on the morning of the trial; I think you have indicated to me what your theory is. I don't require counsel to write extensive motions so long as you indicate with requisite clarity what your point is and give me the authorities to support your point, then I can consider it. I think the day in which counsel would sit down and write twenty pages of learned briefs, those days are past."

In an effort to be certain that he completely understood the Trial Court's ruling in this regard counsel for Appellant stated: "You will hear me on the Motion to Sever the day before trial?"

The Court: 'The day of trial..." (S. Tr. 24)

On the day of trial, May 5, 1970, after Appellant's oral Motion to Dismiss the Indictment was argued and denied, counsel for Appellant moved to sever Weaver case from the cases of Bigsby and Adams on the basis that some of the evidence that might be introduced against Bigsby and Adams would not relate to Weaver and therefore could unfairly prejudice Weaver's case (Tr. 11).

The Court denied the Motion to Sever on the basis that the Motion had not been filed within "a stated time" (Tr. 11). Counsel for Weaver submits that the reasonable interpretation of the Courts comments at the hearing on March 17, 1970, would be that no written Motion to Sever would be necessary

but that the Court would hear the Motion to Sever orally in the event that the Motion to Dismiss the Indictment was denied on the date of trial.

Rule 47 of the Federal Rules of Criminal Procedure provides that "a motion other than one made during a trial or hearing shall be in writing unless the Court permits it to be made orally." It appeared to counsel for Weaver that permission to make the motion orally had been granted.

2. MOTION FOR JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENTS CASE SHOULD HAVE BEEN GRANTED ON THE GROUNDS THAT THE GOVERNMENT HAD NOT MET THE BURDEN OF PROOF AGAINST MICHAEL WEAVER.

Court is requested to read Tr. 48-59, 87-90, 97, 108, 113, 114, 120, 121, 128, 129.

There was no identification of Weaver by Henhoeffer. Henhoeffer testified that one of the men he saw had on a blue jacket (Tr. 53). He further testified "It must have been after the robbery when I saw his blue jacket. I didn't recognize anything else or remember any other characteristics." (Tr. 54). However, Henhoeffer could not identify Weaver in the line-up as being the man who had worn the blue jacket (Tr. 56). The government has based its case against Weaver on the fact that he was apprehended by Officer Anastasi several blocks from the scene of the crime and had on a blue jacket at the time he was apprehended. Neither Officer Anastasi nor Officer Roche were witnesses to the robbery. Their only reason for stopping the Appellant Weaver was that he had on a blue jacket and was running. The Officer who arrested Weaver did not observe Weaver at the scene of the crime but only located him several blocks away. No evidence of any robbery was found on Weaver (Tr. 97). During the testimony of Lt. Blancato the Court reaffirmed that there is no testimony of any identification of Weaver (Tr. 125). At the close of the Governments case Counsel for Appellant Weaver moved for Judgement of Acquittal with regard to Appellant Weaver (Tr. 128). The Court although stating "The evidence, I grant you, is fairly slight." reserved a decision on the Motion (Tr. 129). We submit that the Court should have at that

point dismissed the case against Weaver.

The following excerpts from the case of Bailey (John L.) v. United States of America (supra) are pertinent herein:

Citing Cooper v. United States*213 Fed. 2d 39, 42 (1954) the Court stated as follows:

> "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence."

In the Bailey case, Bailey was observed by the robbery victim prior to the robbery. At that time Bailey was with the person who robbed the victim. When the robbery took place Bailey walked away from the gun man about ten feet then the robber and Bailey both fled in the same direction.

The Court further stated in the Bailey case (supra) as follows at Page 98:

> "Appellant's conduct, as portrayed in the view most favorable to the Government, amounted to presence at the scene of the crime, slight prior association with the actual perpetrator, and subsequent flight. A sine qua non of aiding and abetting, however, is guilty participation by the accused. "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' The crucial inquiries in this case relate to the legal capabilities of the evidence to sustain a jury determination that appellant collaborated to that degree in the robbery."

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*94 U.S. App. D.C. 343

"An inference of criminal participation cannot be drawn merely from presence; a culpable purpose is essential. In Hicks v. United States, the Supreme Court recognized that the accused's presence is a circumstance from which guilt may be deduced if that presence is meant to assist the commission of the offense or is pursuant to an understanding that he is on the scene for that purpose. And we have had occasion to say that "[m]ere presence would be enough if it is intended to and does aid the primary actors." Presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed as when the accused acts as a lookout — or where it stimulates others to render assistance to the criminal act. But presence without these or similar attributes is insufficient to identify the accused as a party to the criminality. And this case is devoid of evidence, beyond what the previous associative acts and the subsequent flight might themselves reflect, that appellant's presence on the scene was designed to in any way sanction or promote the robbery."

The Court in deciding the Bailey case found that:

1) presence at the scene of the crime and identification,

2) slight prior association with the perpetrator,

3) subsequent flight,

were insufficient facts to sustain a conviction.

With respect to Weaver in instant case we have the following distinctions from Bailey:

a) No presence at the scene of the crime

b) No identification by the victim

c) No prior association

d) only flight

In view of the foregoing the government's evidence was insufficient to establish guilt beyond a reasonable doubt and therefore the Motion for Judgement of Acquittal should have been granted.

3. MOTION FOR JUDGEMENT OF ACQUITTAL N. O. V. SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

It is requested that the Court read the following portions of the Transcript: pp 158 thru 166 and p. 209. Further the Courts attention is directed to appellant's Motion for Judgement of Acquittal N. O. V. filed in the District Court May 8, 1970, and the District Court's order denying the Motion dated May 21, 1970.

Weaver testified that he was in fact in Georgetown the night of October 10, 1969, but that he had been brought there by a Mr. Ron Garvey (Tr. 159); that after Garvey had made improper advances he had struck Garvey and jumped from his car and ran from him (Tr. 160) and that during the course of his running he observed the police car and continued his flight. Weaver's evidence was uncontradicted. When asked why he ran from police Weaver replied "That is a question I asked a lot of times. When you see the police, I have been arrested quite a few times doing anything, standing around inside and trying to tell the truth to the police and so forth, and it doesn't matter. I feel I would run from the police, from the policeman when I took it in my mind to do" (Tr. 163). Weaver's explanation of his running is credible and a natural reaction under the circumstances. Certainly there was insufficient evidence to sustain a finding of guilt beyond a reasonable doubt and the appellant's Motion for Judgement of Acquittal N. O. V. filed in District Court

should have been granted. We again rely on the case of Bailey (John L.) vs. United States (supra). See also Wong Sun v. United States 371 U.S. 471, 83 S. Ct. 407, 9 L Ed 2d 441 1963; Starr v. United States 164 U.S. 627 17 S. Ct. 223, 41 L Ed 577 (1897).

The inconclusive evidence of flight and a blue coat cannot possibly sustain this conviction.

For all the foregoing reasons it is respectfully submitted that the District Court erred in failing to grant Appellant Weaver's Motion for Judgement of Acquittal N. O. V.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the District Court Erred in:

1) Failing to grant Appellant's Motion to Dismiss the Indictment

2) Failing to grant Appellant's Motion to Sever

3) Failing to grant Appellant's Motion for Acquittal following close of Government's case

4) Failing to grant Appellant's Motion for Judgement of Acquittal N. O. V.

Judgement of the District Court Should be Reversed.

Respectfully Submitted

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Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was hand delivered to the United States Attorney this _____ day of April, 1971, and mailed postage prepaid to Ben Cotten, Esq., 1314 19th Street, N. W., Washington, D. C., Counsel for Gerald A. Bigsby, and Harvey B. Bolton, Jr., 1001 Conn. Avenue, N. W., Washington, D. C., 20036, Counsel for Michael R. Adams.

Thomas P. Brown III

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,797

UNITED STATES of America

Appellee

v.

Michael WEAVER

Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

Thomas P. Brown III
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Washington, D. C., 20014

Counsel for Appellant
(Appointed by this Court)

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1. DISCUSSION OF GOVERNMENTS COUNTER STATEMENT OF CASE

The Governments statement on p. 3 line 21 of its counter statement of the case that "Henhoeffer directed Officer Roche to the three robbers fleeing south on 33rd Street" implies that Henhoeffer had the 3 men in sight from the time police picked him up. This is not so. It was not until the police car came to 33rd and N Streets that two persons were spotted running East on N Street (Tr. 94, 95) over a block away (Tr. 112).

2. INDICTMENT INVALID

The Government bases its argument that the indictment is valid though based on hearsay principally on the case of Costello v. United States 114 U.S. 359 (1956).

However, in the case of United States v. Arcuri 282 F Supp. 347 (D.C.N.Y. 1968) the Court stated as follows:

> "There is no reason to believe that the Supreme Court in Costello intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. Rather Costello seems to have been designed to avoid technical failures of indictments because hearsay or other inadmissable evidence was used either inadvertently or because nothing more probative was immediately available" (at p. 349)

3. EVIDENCE AGAINST WEAVER INSUFFICIENT

In attempting to distinguish the evidence presented in the case against Appellant Weaver from Bailey v. United States 135 U.S. App D.C. 95, 416 F 2d 1110 (1969) Appellee states "The evidence against Weaver is twofold" (p. 11 of government brief):

1) a blue jacket

2) side by side flight with man who carried and would eventually discard the robbery victim's wallet

Yet in Bailey (supra) the Court held that:

1) presence at scene of crime plus a positive identification of Bailey by victim

2) association at scene of crime between Bailey and robber

3) flight from scene by Bailey and robber in same direction

were insufficient facts to sustain a conviction.

4. CONCLUSION

Wherefore it is respectfully submitted that the Judgment of the District Court should be reversed.

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Motion to sever should have been granted since Appellant Weaver was prejudiced by joinder, Rule 14 Federal Rules of Criminal Procedure; United States v. Kelley 349 F 2d 720 (2d Cir. 1965) Schaffer v. United States 221 F 2d 17 (5th Cir. 1955)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was hand delivered to the United States Attorney this 16th day of August, 1971, and mailed, postage prepaid, to Ben Cotten, Esq., 1314 19th Street, N.W., Washington, D.C., Counsel for Gerald A. Bigsby, and Harvey B. Bolton, Jr., 1001 Conn. Avenue, N.W., Washington, D.C., 20036, Counsel for Michael R. Adams.

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